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No. _____

In The

Supreme Court of the United States

Jerry Butler and James Harris,

Petitioners,

vs.

New York State Teamsters Conference Pension and Retirement Fund,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. Whether the retirement plan trustee properly credited petitioners with pension credits for each year in which they worked under a retirement plan, and if not, whether there is a remedy in district court.

2. Whether the district court initially, and the circuit court on appeal, ignored a mistake by the plan trustee(s) which deprived the petitioners of their rights under the plan as to the number of years of pension credit they had earned, and if so, whether that issue raised a question of fact, thereby preventing determination by summary judgment.

3. Whether a plan trustee ever has the authority to interpret plan documents so as to effect a waiver of the retirees' rights to benefits under the plan, and if such right exists, what standard of review the courts should impose.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	12
CONCLUSION	13
APPENDIX	
CIRCUIT COURT OPINION	A 1
DISTRICT COURT DECISION	A 5

TABLE OF AUTHORITIES

Cases

Allied Chemical & Alkali Workers of America, local union no. 1, v. Pittsburgh Plate Glass Company, Chemical Division, et al., 404 US 157 (1971) 11

Firestone Tire and Rubber v. Bruch, 489 US 101 (1989) 7, 10, 12

Hoefel v. Atlas Tack Corp., 581 F. 2d 1 (1978) 11

Inland Steel Co. v. National Labor Relations Board, et al, 170 F. 2d 246 (1948) 11

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Jerry Butler and James Harris respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is not officially reported, but can be found at 171 Fed. Appx 893 (March 3,

2006), and is reproduced in the Appendix at A-1.

The decision of the district court, which granted summary judgment to appellee below is unreported, but is reproduced in the Appendix at A-5.

JURISDICTION

The final judgment of the Second Circuit Court of Appeals was filed on August 8, 2006, and Petitioner's time to file the Petition has been extended to January 5, 2007. This Court's jurisdiction is invoked pursuant to Title 28 USC §1254 (1).

STATUTORY PROVISIONS INVOLVED

Title 29 USC §1002 (1) (2) & (7) , which provides:

> **(1)** The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on

retirement o. .th, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--

(I) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

***

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 USC 1132 (a), which provides:

§ 1132. Civil enforcement
(a) Persons empowered to bring a civil action
A civil action may be brought--
(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under **section 1109** of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;
***.

STATEMENT

Petitioners are both former truck drivers, and members of the International Brotherhood of Teamsters ("IBT"). They each retired and were therefore eligible for retirement benefits under a multi-employer retirement plan.

That plan was the result of a collective bargaining agreement between the IBT and various employers.

During their respective careers, petitioners each worked for different employers, and had been members of different locals of the IBT. All of their employers however were subject to the same retirement plan, which had been negotiated by the IBT, and was subject to *ERISA* [29 USC 1001, *et seq.*].

The plan was non-contributory, and when petitioners retired, the calculation of their retirement benefits was based on the contributions to the plan made by the respective employers, which in turn was based on their respective service with the different employers. The calculation of the their respective benefits was then made by the plan trustees, which ordinarily would be a routine matter.

Coincidentally, each petitioner had been covered by the Central States Southeast Southwest Areas Pension Fund ("Central Fund") the New York State Teamsters Conference Pension and Retirement Fund ("NY Fund"), who were the defendants in the underlying suit, and respondents below. Each petitioner objected to the calculation of their retirement benefits, as calculated by the Trustees of the NY Plan, but not the Central Fund.

After exhausting their administrative remedies, they brought

suit together. The initial filing was transferred to the district court for the Northern District of New York.

Petitioners claimed *inter alia* that they were deprived of a portion of their retirement benefits, because of the way that their pensions were calculated by the NY fund trustees.

All relevant employers and the IBT had entered into a reciprocal agreement, effective in 1964, which among other things, established a procedure for calculating retirement benefits earned, as petitioners did, through different employers (or locals). The only responsibility of the various employers was to pay into the retirement fund the amounts established by the collective bargaining agreements. Thereafter, on retirement, the respective pension funds would calculate the benefit due to the retirement employee and make payments, usually through a lifetime annuity.

The Central Fund and the NY Fund calculated the pension benefits differently, and it is Petitioners' contention that Central Fund did it correctly and the NY Fund did not.

Petitioners represented themselves in all prior court. proceedings. Petitioners moved for summary judgment and the attorneys for the Pension fund cross moved for summary judgment.

The defendants in the district court presented affidavits

showing how the NY Fund calculated petitioners' benefits under the reciprocal agreement. The district court essentially adopted their explanation of the method of making the calculations, and then held that the Trustees had made their calculations consistent with this method,

The district court then noted that there were two standards of reviewing a Trustees actions, as discussed in *Firestone Tire and Rubber v. Bruch*, 489 US 101 at 115: *de novo* review or an "arbitrary and capricious" standard, depending on what authority had been granted to the Trustee(s). In this case, the district court held, it didn't matter because the calculations met either standard. [A-20].

The circuit court affirmed, saying that ti agreed with the district court that " ... based on the language in the plan document, the arbitrary and capricious standard of review applies to the Board of Trustees' calculations of appellants' benefits." [A-2].

Since the matter before the district court was a motion and cross motion for summary judgment, the central issue was whether there was any material uncontested fact, which would require a fact hearing.

The NY Fund, in calculating Petitioner Butler's pension credits was in determining he worked 30.1 years, when the documents before the court clearly showed that Butler had

worked 34.7 years. That alone should have required further discovery before considering summary judgment.

In addition, it was never made clear why the NY Fund made its calculations differently that did the Central Plan (ignoring the difference in the years Butler worked).

A brief summary will show how the retirement plan in general operated, and how the reciprocal agreement dealt with employees with service credits from different plans.

Employees were not required to contribute to the retirement plans. An employee would earn up to one credit for each year of full time employment. What that credit was worth in benefits, according to the papers filed below by defendant below was calculated by the following formula, usually made when the employee filed for retirement benefits: (1) The fund would calculate the contribution the employer made to the fund for the benefit of the retiring employee year by year, and either multiple that amount by 2.6%, or apply a minimum benefit, which ever was greater [the minimum was determined according to the employer's annual contribution to the retirement fund]. (2) The total of the yearly benefit amounts for the retiring employee were then calculated, and that total equaled the monthly pension.

That procedure required simple mathematics. When

different employers and different funds were involved. then. according to the NY Fund's understanding of the reciprocal agreement, each fund would separately calculate the retirement benefits due, and they would be added together to establish the monthly benefit amount.

In such case, each fund would determine the total years that the employee worked for all covered employers, and then would calculate the benefits according to the method described above, *but,* clearly, there would be years in which there would be no payments to the respective fund because the employer was not then subject to that fund.

That is, for example, if an employee worked for employer A who paid benefits to plan A for ten years, and then worked for employer B, who contributed to fund B for 20 years, fund B would have had contributions for 20 years, and no contributions for ten years. Those ten years would be calculated at the minimum amount established for that employer. and of course, plan A would make the same calculation.

Then, each plan would apply a factor equal to the percentage of time the employee was covered by that plan in relation to the total time that employee was covered by any plan.

Thus, in our example of 30 years working credit, plan A,

where the employee worked for 10 years, would multiply the benefit thus calculated by 10/30 (33.3%) and plan B would multiple the benefit amount it had calculated by 20/30 (66.7%). Those two sums would then be the monthly benefit amount for the employee, as a defined benefit for life.

That, essentially, is what the Central Plan did, but the NY Plan did not, which should have serious questions of fact, not law, and precluded summary judgment to the NY Plan.

After retirement, each Petitioner believed that his pension had been wrongly calculated, and each went through the normal administrative steps to challenge the determination.

Neither was successful in getting a change in their respective benefit, and they then jointly brought the underlying suit under *ERISA* [29 USC §1001, *et seq.*] .

The underlying suit raised two issues: first, whether the benefit amounts were properly calculated, and second, whether the employee received the proper credits from their respective employers.

In reliance on this Court's decision in *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, the district court discussed the proper standard of reviewing a Trustees actions, and then concluded that under either the "*de novo*" or the "arbitrary and capricious" standard, the Trustees decision was

correct.

Petitioners then sought appeal to the second circuit, which held that: "We agree with the district court that, based on the language in the plan document, the arbitrary and capricious standard of review applies to the Board of Trustees' calculations of appellants' benefits ..."

Never considered was the conclusion, by the NY Plan, that Butler had only worked 30.1 years, when the records showed total employment under all plans of 34.7 years.

Retirement benefits, paid by an employer become pat of the employees compensation [*Inland Steel Co. v. National Labor Relations Board, et al*, 170 F. 2d 246, at 181 (7th Circuit, 1948), *cert. den.*363 US 960, on the pension issue]. Furthermore, such " ... vested retirements may not be altered without the pensioner's consent." (*Inland Steel* 170 F. 2d at 182). To the same effect, *see, Allied Chemical & Alkali Workers of America, local union no. 1, v. Pittsburgh Plate Glass Company, Chemical Division,* et al., 404 US 157 (1971), discussion at page 181 (future benefits are part of compensation).

In *Hoefel v. Atlas Tack Corp.*, 581 F. 2d 1, the court held at page 6 that:

"We believe that public policy long has required that pension plans be construed, where possible, to avoid the forfeiture of rights which

an employee, through years of service, has earned, ...
***
Where the employer establishes the terms of a pension plan, those terms should be construed in favor of the employee.

In this cased, the district court focused on the *method* the NY Plan Trustees used to calculate the monthly benefit, and not on the calculation of benefit years. In addition, the mere fact that the Central Plan Trustees calculated the benefit amount differently than did the NY Plan Trustees should have raised questions as to the basis of the NY Plan Trustees interpretation and application of the reciprocal agreement, and compelled further discovery to explore that question, thereby defeating summary judgment, at least at that stage.

REASONS FOR GRANTING THE PETITION

This is not merely a case raising questions about procedures on summary judgments in the district courts, an issue considered many times before.

The major issue in this case is the extent of a pension Trustee's discretion when considering or interpreting the terms of a pension plan.

An agreement between a union and an employer is governed, generally, by contract law, and the relationship between a retiree and the pension plan trustee is governed generally by

fiduciary law. See *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101.

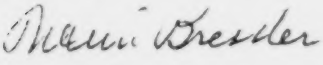
The issues in this case are (a) the authority of a plan trustee to interpret the plan documents so as to deprive a retiree of earned pension credits, and (b) the standard of review where a decision of a plan trustee effectuates a loss of benefits or a waiver of such benefits, which does not appear to have been judicially determined.

These issues go far beyond the interests of the petitioners, and *sotto voce* affect substantially every retirement or pension plan negotiated through a collective bargaining agreement.

CONCLUSION

Certiorari should be granted to resolve these issues.

Respectfully submitted,



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In The

Supreme Court of the United States

Jerry Butler and James Harris, *Petitioners*

- vs. -

New York State Teamsters Conference Pension
and Retirement Fund

Appendix

171 Fed. Appx. 893 This case was not selected for publication in the Federal Reporter.

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Second Circuit Rules § 0.23. (FIND CTA2 s 0.23.)

United States Court of Appeals,
Second Circuit.

Jerry BUTLER, James G. Harris, Plaintiffs-Appellants,

v.

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, Defendant-Appellee.

No. 05-1432-cv.

March 3, 2006.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgement of the United States District Court for the Northern District of New York (Munson, J.) is **AFFIRMED.**

Jerry Butler, Decatur, Georgia James G. Harris, Canal Fulton, Ohio, for Appellants, pro se.

Donald L. Havermann, Buffalo, New York Gerald J. Green, Utica, New York, for Appellee.

PRESENT: Hon. SONIA SOTOMAYOR, Hon. ROBERT A. KATZMANN, Circuit Judges, and Hon. RICHARD K. EATON, Judge. [FN*]

FN* The Honorable Richard K. Eaton of the United States Court of International Trade, sitting by designation.

SUMMARY ORDER

Appellants Jerry Butler and James G. Harris appeal from a February 16, 2005 judgment granting appellee's motion for summary judgment and dismissing appellants' complaint under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* We assume the parties' familiarity with the factual background of the case, its relevant procedural history and the issues on appeal.

This Court reviews orders granting summary judgment *de novo,* focusing on whether the district court properly concluded that there was no genuine issue of material fact and that the moving party was entitled to summary judgment as a matter of law. *See Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir.2003).

We agree with the district court that, based on the language in the plan document, the arbitrary and capricious standard of review applies to the Board of Trustees' calculations of appellants' benefits. *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 115, 109 S. Ct. 948, 103 L. Ed.2d 80 (1989) (holding that an arbitrary or capricious standard of review applies

when an EISA plan gives fiduciary or administrator discretionary authority to determine eligibility for benefits or to construe terms of plan). The only disputed issue raised by the appellants in challenging the Board's calculation is whether the Board improperly calculated their benefits under a 1997 plan agreement that postdated their time of service, based on letters from the appellee indicating that *894 the Board had used that agreement. The mere existence of those letters, without more, is insufficient to raise issues of material fact, because it is apparent from the record that the Board used only the pertinent 1964 plan agreement in doing the calculations. Under the 1964 agreement, Butler's benefits were mathematically correct. To the extent that there may have been a mathematical error in the calculation of Harris's benefits, such error was harmless because Harris received the benefit arrived at by applying his normal pension, which was higher than either the number given in the appellee's memorandum of law or the number reached through a correct application of the relevant formula. Accordingly, there are no material issues in dispute suggesting that the Board acted arbitrarily or capriciously in calculating appellants' benefits. The appellants further contend that the appellee should be subject to sanctions for engaging in intentional deception by failing to provide Butler with a copy of the 1997 plan agreement upon request. However, the record supports the district court's conclusion that the appellee made a good-faith effort to comply

with Butler's requests.

For the reasons discussed, the judgment of the district court is affirmed

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

JERRY BUTLER AND JAMES G. HARRIS,

Plaintiffs,

v.

5:01-CV-01211

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND,

Defendant,

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HOWARD G. MUNSON, SR. J.

MEMORANDUM DECISION AND ORDER

BACKGROUND

The New York State Teamsters Conference Pension and Retirement Fund (the "NYS Fund") is a multi-employer pension plan that provides pension benefits to persons covered by collective bargaining accords entered into by certain employers and local unions of the International Brotherhood of Teamsters. The NYS Fund is a Taft-Hartley pension plan fund that was established, and is maintained by an eight member board of trustees ("Board of Trustees"). Four members of the Board of Trustees represent employers who contribute to the Fund, and four members represent the International Brotherhood of Teamsters, whose members benefit under the NYS Fund.

Pension benefits under the NYS Fund are based on the number of pension credits participants earn and the contributions

made to the NYS Fund by employers on their behalf. Usually, participants earn pension credits under the NYS Fund by working in employment under collective bargaining agreements that require employers to make contributions to the NYS Fund on the participants behalf ("Contributory Service Credit"). Participants may earn up to a
maximum of one credit for each year, or portion thereof, that they work for an employer that is required to make contributions to the NYS Fund on their behalf.(Plan Document Ex, § 3.2(c)). Under § 4.1 of the NYS Fund's Plan Document, a participants monthly pension benefit ("Normal Pension") is calculated by adding the benefit the participant earns for each year of service credit. The benefit earned for each year of service credit is generally determined by taking the greater of: (a) 2.6% times the contributions made to the NYS Fund on the participant's behalf for the year, or (b) the minimum benefit set forth in the plan document for the year in question, multiplied
by the pension credit earned by the participant for that year, up to a maximum of one credit per year.

The minimum benefit referred to in (b) supra is an amount that depends upon the employer's contribution rate to the NYS Fund. Ordinarily, the higher the employer contribution rate, the higher the minimum benefit. (Plan Document, Ex. 4 § 4.1) Inasmuch as contributions
made on a participant's behalf discontinues when he or she stops working in the covered employment. A participant is commonly entitled to the minimum benefit that was in effect at the time he

or she worked in

employment covered by the NYS Fund.

The following is an example of a calculation of the Normal Pension:

Assume that Worker A earned one pension credit for each of the 25 years for which contributions were made to the NYS Fund on his behalf. For his last 20 years of employment, his employer contributed $3,000 per year to the NYS Fund, but for his first five years, his employer only contributed $1,000 per year. Worker A's Normal Pension under the NYS Fund would be calculated by taking the sum of the greater of; (a) 2.6% times the contributions made on his behalf for each year to the Fund, or (b) the minimum benefit for the year, which is assumed to be $35 for this example, times the pension credit earned for the year. For the last 20 years the $3,000 that was contributed on Worker A's behalf, 2.6% times $3,000 is $78 per year, which is greater than the minimum benefit. For the first five years, however, 2.6% times $1,000 amounts to $26 per year. Because the minimum benefit of $35 is greater that $26, the $35 minimum benefit will be paid for the first five years. Under § 4.1 of the NYS Fund plan, Worker A's monthly pension benefit would equal the sum of $78 per year for 20 years, $78 x 20 = $1,560, plus $35 per year for five years, $35 x 5 = $175, making a total monthly benefit of $1,735.

By and large, NYS Fund participants are eligible to receive their Normal Pension any time after reaching age 65 or, if they have earned at least 15 years of service credit, upon reaching age 60. Participants do not have to wait until age 60 to begin

receiving benefits because the NYS Fund has two dissimilar early retirement options, one that is actuarially reduced and another that is not. Participants reaching age 55 and earned at least 15 years of service credit may decide to receive a pension benefit equal to their Normal Pension actuarially reduced for each year, or fraction thereof, that their benefits commence before age 60. (Plan Document, Ex. 4 § 4.3).

Years ago, the NYS Fund became a signatory of the 1964 National Reciprocal Agreement for Teamsters Pension Funds ("1964 National Reciprocal Agreement"), in which it agreed to provide certain reciprocal pension benefits to individuals whose service is split between NYS Fund and any other fund that is a signatory to the 1964 National Reciprocal Agreement. (1/28/02 Affidavit of David E. Menter, Executive Administrator of the NYS Fund, Ex. 1 to Cross Motion ¶ 6). These reciprocal pension benefits are provided, in part, because, the signatory pension funds have agreed to recognize pension credits earned under signatory funds ("Related Service Credit"). At the denouement, both signatory funds wind up paying a proportionate share of the participant's pension benefit.

Benefit calculations under the 1964 National Reciprocal Agreement consist of a three step process. First, a signatory fund, e.g. Fund X, must add the service credits a participant has earned under Fund X with the Related Credits Earned under the other signatory fund, Fund Y, to ascertain the participant's Combined Service Credit. (1964 National Reciprocal Agreement, Ex. 2 Exhibit A § 4). Second,

Fund X must calculate the participant's pension benefits under the terms of its own pension plan, based on the participant's Combined Service Credit (1964 National Reciprocal Agreement, (Ex. 2 Exhibit A § 8(a)). Importantly, the 1964 National Reciprocal Agreement does not specify the level of benefits that is to be used in calculating the participant's pension benefits. Instead, the level of benefits to be used is determined by each signatory fund independently. (National Reciprocal Agreement Ex. 2). As previously pointed out, the NYS Fund benefit formula is based upon the greater of (a) 2.6% times the contributions made to the NYS Fund on the participant's behalf for the year, or, (b) the minimum benefit for the year multiplied by the pension credit earned by the participant for the year. Thus, when a participant is working under the other fund, the NYS Fund will use the minimum benefit to determine the participant's benefit for that year.

Returning to the example, once the participant's level is determined for each year, step three in the calculation in the 1964 National Reciprocal Agreement involves multiplying benefits for all years by a fraction ("Reciprocal Pension Factor") determined by dividing the participant's Contributory Service Credit earned under Fund X by the participant's Combined Service Credit earned under Funds X and Y. (1965 Reciprocal Agreement (Ex. Example A § 8.(b). The resulting amount is Fund X's share of the individuals' reciprocal pension benefit. (National Reciprocal Agreement (Ex. 20)). Fund Y will be responsible for paying its share after performing a similar calculation.

The application of the 1964 National Reciprocal Agreement, nevertheless, can produce an amount that is less than the amount earned by the participant under the NYS Fund, regardless of the 1964 National Reciprocal Agreement; so the NYS Fund, as a final step determines if a participant's Normal Pension from the NYS Fund, based on the participant's Contributory Service Credit, is greater than the amount calculated under the 1964 National Reciprocal Agreement. If it is, the NYS Fund will pay the participant his or her Normal Pension amount, while using the participant's Combined Service Credit to determine the participant's eligibility for various pension payment options available under the NYS Fund's plan.

About or during 1997, a revised National Reciprocal Agreement was proposed, and was adopted by the NYS Fund effective January 1, 1999. The 1997 National Reciprocal Agreement was integrated in the Fund's plan as Article 12 and states that: Participants who on the Date of this Article [January 1, 1999] were eligible for and had applied for, or were receiving Reciprocal Benefits under the predecessor National Reciprocal Agreement shall not, by reason of the adoption of this Article governing Reciprocal Pension Benefits, forfeit or suffer any reduction of their Reciprocal Pension Benefits. The benefits provided pursuant to this Article shall not apply to any Participant who has retired prior to the Effective Date.

Plaintiff James Harris retired in 1998, prior to the effective date of the 1987 National Reciprocal Agreement, and Plaintiff Jerry Butler was eligible for, and applied for, a reciprocal pension

benefit from the NYS Fund in 1998. Hence, both Plaintiffs agree that their benefits must be calculated under the predecessor 1964 National Reciprocal Agreement. The 1997 National Reciprocal Agreement also does not apply to the Plaintiffs because the other fund under which they earned credit, the Central States Southeast Southwest Area Pension Fund, ("Central States Fund"), never adopted the 1997 National Reciprocal agreement, but were a signatory of the 1964 National Reciprocal Agreement.

Butler earned 16.0 and Harris earned 9.1 Contributory Service Credits under the NYS Fund, as well as the pension credits they earned under the Central States Fund. Both Plaintiffs, applied for, retired, and began receiving pension benefits from the NYS Fund based upon their Combined Service Credit between the NYS Fund and the Central States Fund. They each claimed initially that the NYS Fund incorrectly calculated their pension benefits under the 1964 National Reciprocal Agreement claiming that the NYS Fund paid a monthly benefit of $3,500 for participants who had 30 years of service.

The Fund replied that it does not pay a monthly benefit of $3,500 to participants having 30 years of service. It then pointed out that it pays a benefit for each year of service that is equal to the greater of (a) 2.6% of the contribution made to the fund for the year on the participant's behalf; or (b) the minimum benefit factor for the year multiplied by the pension credit earned by the individual for the year multiplied by the pension credit earned by the individual for the year. Plaintiffs then claimed that the NYS Fund should have counted the contributions that were made to the

Central States Fund as if they were made by their employers to the NYS Fund, and then have their benefits calculated by using the 2.6% of contributions formula rather than the $35 minimum benefit.

Butler appealed the calculation of his benefits to the Board of Trustees of the NYS Fund. The appeal was denied in August 1990, and Butler requested the Board of Trustees to reconsider the denial. Harris also appealed the calculation of his benefits to the Board of Trustees. On January 29, 2001, the Board of Trustees denied both Butler's request for reconsideration, and Harris' appeal. In its written opinions denying Butler's reconsideration request and Harris' appeal, the NYS Fund explicated:

The Butler opinion:

> You claim essentially that Exhibit A of the 1964 National Reciprocal Agreement required the NYS Fund to calculate your pension under 2.6% of contributions part of the NYS Fund benefit formula as if the contributions that were actually made on your behalf to the Central States Fund were instead made to the NYS Fund. That claim is not a correct interpretation of Exhibit A and it is not consistent with the way the NYS Fund calculated partial pensions under the 1964 National Reciprocal Agreement.

The Harris opinion:

> Section 9 of Exhibit A of the 1964 National Reciprocal Agreement provides that "[t]he payment of a partial pension shall be subject to all of the conditions continued in this plan applicable to other types of pensions . . . ." One of the conditions in Section 4.1(c) of the NYS Fund's pension plan is that contributions

> must be required to be made to the NYS Fund in in order for a participant to claim a benefit under the percentage contributions part of the benefit formula. Obviously, no contributions were required to be made to the NYS Fund on your behalf while you were working under the Central States Fund.

(Letters of February 28, 2001 sent to Butler and Harris from NYS Fund, Ex. 32)

Plaintiff's then commenced this action under § 502 of EISA, 29 U.S.C. § 1132(d)(1), alleging that they are entitled to a higher pension payment than those provided because the NYS Fund incorrectly calculated their pension benefits under the 1964 National Reciprocal Agreement, and that the NYS Fund did not timely provide Butler with a copy of 1967 National Reciprocal Agreement after his requests for same during the administrative appeal process. The lawsuit was instituted pursuant to 29 U.S.C. § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974, as amended ("EISA"), alleging that their pension benefits under the NYS Fund were miscalculated under the wrong National Reciprocal Agreement which the NYS Fund, and several other Teamsters pension funds, have entered. Plaintiff Jerry Butler maintains that he was not given the documents he requested from the NYS Fund in violation of section 104(b) of EISA, 29 U.S.C §1024(b), and is seeking civil penalties under section 502(c) of EISA, 29 U.S.C. § 1132(c).

The complaint seeks increased pension benefits, payment of the unpaid difference between the amounts paid and the amounts actually due plaintiffs under their retirement plan, monetary and

civil penalties, costs and statutory attorneys fees.

Currently before the court are cross motions for summary judgment pursuant to Federal Rule of Procedure 56. Defendant has also moved to strike Plaintiffs' demand for a jury trial because lawsuits brought under § 502 of EISA are equitable claims that should be tried before the court and not a jury. All motions have been opposed by the relevant party or parties.

DISCUSSION

Summary judgment is appropriate where the facts and law as represented in the pleadings, affidavits and other summary judgment evidence show that no reasonable trier of fact could find for the nonmoving party as to any material fact. Fed.R.Civ.P. 56; Lujan v. National Wildlife Federation, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed.2d 695 (1990); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986); Celotex Corporation v. Catrett, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L. Ed.2d 265 (1986); "The moving party bears the initial burden of identifying those portions of the pleadings and discovery in the record that it believes demonstrate the absence of a genuine issue of material fact, but is not required to negate elements of the nonmoving party's case." Celotex, 477 U .S. at 322-25, 106 S.Ct. 2548. If the movant fails to meet its initial burden, the motion must be denied, regardless of the nonmovant's response. Id. If the movant does meet its burden, the nonmovant must go beyond the pleadings and designate specific facts showing that a genuine issue of material fact exists for trial.

Matsushita Electric Industries Corp. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L. Ed.2d 538 (1986). A party opposing summary judgment may not rest on mere conclusory allegations or denials in its pleadings unsupported by specific facts presented in affidavits opposing the motion for summary judgment. Fed. R. Civ. P. 56(e); Lujan, 497 U.S. at 888, 110 S.Ct. 3177.

In determining whethergenuine issuesof fact exist, "[f]actual controversies are construed in the light most favorable to the nonmovant, but only if both parties have introduced evidence showing that a controversy exists." Eastman Kodak v. Image Technical Services, 504 U.S. 451, 112 S.Ct. 2072, 119 L. Ed.2d 265 (1992). However, in the absence of any proof, the Court will not assume that the nonmoving party could or would prove the necessary facts. Lynch, 140 F.3d at 625. A party must do more than simply show some "metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586, 106 S.Ct. 1348. "If the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Id. at 587.

Due to the fact that plaintiffs appear pro se, the court will give their pleadings liberal construction, Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed.2d 652 (1972), and "interpret them 'to raise the strongest arguments they suggest,.' " McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999), quoting, Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994).

Nevertheless, proceeding pro se does not otherwise relieve a

litigant of the usual requirements of summary judgment proceedings, and a pro se party's bald assertions, unsupported by evidence, are insufficient to obtain a summary judgment, or overcome an opponent's well-founded motion for summary judgment. Carey v. Crescenzi, 923 F. 2d 18, 21 (2d Cir. 1991). On a motion for summary judgment, plaintiff must do more than rest on the allegations in his complaint, he must come forward with "concrete evidence from what a reasonable jury could return a verdict in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986).

Plaintiffs allege that the 1998 calculations of their partial reciprocal pension benefits were incorrect because the NYS Fund either incorrectly applied the partial pension calculation formula, or used an altered formula restated in the 1997 Reciprocal Agreement that was to become effective January 1, 1999, causing these benefits to be $500 less than the amount that should have been calculated under the 1964 Reciprocal Agreement. The use of the restated formula was improper because their partial reciprocal pensions were vested under the 1964 Reciprocal Agreement, and ERISA prohibited the reduction of such benefits other than for hardship purposes, citing 29 U.S.C. § 1082(c)(8)(C).

However, Plaintiff Harris retired in 1998, and Plaintiff Butler was eligible for, and had applied for, reciprocal pension benefits in 1998, but the 1997 Reciprocal Agreement was not effective for the NYS Fund until January 1, 1999, hence, its terms could not be used by the NYS Fund to compute either plaintiff's benefits. Their benefits had be computed under the provisions of

the 1964 Reciprocal Agreement, which all the parties to this law all agree was the correct document to use in the calculation of plaintiffs' reciprocal pension benefits. (Def. Cross-Motion at 8, 13-14; Pls. Mem. Supp. Summ. J., at 4, ¶ 13). Plaintiffs have not shown what error, or errors occurred in NYS Fund's reciprocal pension benefits computations. Plaintiffs further maintain that the decision of the NYS Fund's Board of Trustees affirming the calculation of their reciprocal pension benefit was arbitrary and capricious, that rather than $35, their minimum benefit rate should be $70 dollars, and that the NYS Fund should be penalized for not providing Plaintiff with documents they requested.

Plaintiffs claim that the NYS Fund miscalculated its partial pension benefits because it did not count the contributions their employers made to reciprocal funds and apply them under the 2.6% of contributions prong of the NYS Fund's benefit formula.

At no time did the NYS Fund ever count contributions made to another fund under the contributions, including reciprocal funds, in computing participants' pension benefits under the 2.6% of contributions formula. (Menter Aff., Ex. 1 to Cross Motion ¶ 7). Under the terms of the NYS Fund's plan document, contributions are included in computing a pension's benefits only if the contributions received by the NYS Fund. The 1964 Reciprocal Agreement specifically states that "[t]he payment of a Partial Pension shall be subject to all of the conditions contained in this Plan applicable to other types of pension. . . ." (Section 9 to Exhibit A of 1964 Reciprocal Agreement, Ex. 2 to Cross Motion). The NYS Fund's plan document requires that

contributions must be "paid to the Plan" to be counted in the benefit formula (Plan Document, Ex 4 to Cross Motion Section 1.15). The NYS Fund construes the Plan Document and 1964 Reciprocal Agreement as not permitting the inclusion of contributions made to other funds in computing benefits for reciprocal pensioners. (Menter Aff. Ex. 1 to Cross Motion ¶ 7).

ERISA does not provide a standard for reviewing a plan administrator's interpretation of an ERISA plan's language. Thus, courts look to the plan documents to decide the appropriate standard of review. "[A] denial of benefits challenged under [ERISA] is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S.Ct. 948, 956-57, 103 L. Ed.2d 80 (1989); Miller v. Metropolitan Life Insurance Co., 925 F.2d 979, 983 (6th Cir.1991) ("[A] trustee's decisions in discharging his duties under a trust instrument are accorded deferential treatment only when the instrument itself grants the trustee discretion ..."); By comparison, the highly deferential arbitrary and capricious standard of review applies where a benefit plan unambiguously grants the administrator discretionary authority to construe the terms of a plan). Phillips v. Teamsters Local 639 Employers Health and Pension Trust, 79 F. Supp.2d 847, 880 (N.D. Eastern Div. Ohio 2000). Here, § 8.3 of the NYS Fund's Plan Document states that the Board of Trustees "shall have the exclusive right to interpret the Plan and to decide any matters arising thereunder in

connection with the administration of the Plan." (Plan Document § 8.3 Ex. 4 to Cross Motion). Here, § 8.3 of the NYS Fund's Plan Document states that the Board of Trustees "shall have the exclusive right to interpret the Plan and to decide any matters arising thereunder in connection with the administration of the Plan." (Plan Document § 8.3 Ex. 4 to Cross Motion)

Plaintiffs argue that Defendants' calculation of their pensions was arbitrary and capricious because their partial pension benefits calculations were not done in a manner consistent within the plain meaning of the formula for evaluating partial pension benefits set forth in Exhibit A, Section 8 of the 1964 National Reciprocal Agreement. However, it is not necessary to dwell on the proper standard of review because Defendant's calculations of Plaintiffs' partial pensions were correct under the plain language of the formula set forth in Exhibit A of the 1964 National Reciprocal Agreement. Ergo, Plaintiffs' claims fail even under a de novo standard of review.

The NYS Fund increased the minimum benefit rate from $35 to $70 on September 1, 1996. The increase was available only to participants actively working under the NYS Fund. The $70 minimum benefit rule states:

> The above minimum rates are applicable only to participants who are actively at work on September 1, 1996, or have not had a Break-in-Service Year as of January 1, 1997. Any other Participant who has future Service Credit for contributions made before January 1, 1997 must have contributions made on his behalf by a Contributing Employer on or after January 1, 1997 in accordance with the hours requirement.

(The Plan Document describes a Break-in-Service Year as a plan year in which a participant does not complete more that 500 hours of service with an employer contributing to the NYS Fund. - Plan Document, Ex. 4 to Cross Motion §§ 1.5, 1.18).
(Plan Document, Ex. 4 to Cross Motion, Amendment 13 at 2)

Plaintiff Butler's last NYS Fund covered employment was in 1990, and Harris' was in 1986. (Butler's Benefit Calculation, Ex. 12 to Cross Motion; Harris' Benefit Calculation, Ex.. 26 to Cross Motion). Consequently, the Plaintiffs were ineligible for the $70 minimum benefit rate because they were not actively employed under the NYS Fund on January 1, 1996, had a Break-in-Service Year before January 1, 1997, and they did not have contributions made on their behalf to the NYS Fund on or after January 1, 1997. ERISA does not prohibit the NYS Fund from creating future benefit increments available only to active participants.

ERISA 29 U.S.C. § 1024(b)(4) states that "[t]he administrator. shall upon written request of any party or beneficiary, furnish a copy of the latest updated plan description ..., or other instruments under which the plan is operated." ERISA 29 U.S.C § 1132(c)(1) provides that, if requested information is not mailed within 30 days after such request is received, penalties of up to $100 for each day of delay may be assessed against the plan administrator. In assessing a claim for penalties, courts have considered various factors, including "bad faith or intentional conduct on the part of the administrator, the length of the delay, the number of requests made and documents withheld, and the existence of any prejudice to the participant or beneficiary." Pagovich v. Moskowitz, 865 F. Supp. 130, 137 (S.D.N.Y. 1994).

Whether to assess penalties under this statute is committed to the court's own discretion. Goldstein v. Group Insurance Plan for Fairchild Republic, 940 F. Supp. 474, 480 (E.D.N.Y 1995), aff'd, 99 F.3d 101 (2d Cir. 1996); ERISA 29 U.S.C. § 1132(c)(1).

The complaint in this action asserts that Plaintiffs requested the NYS Fund to send them a copy of the 1997 Reciprocal Agreement NYS Fund on or about May 17, 1999, and did not receive the document until March 25, 2001. On October 13, 1999, and July 30, 2000 Plaintiff Butler requested a complete text of the 1997 Reciprocal Agreement, and the requested document did not arrive until March 21, 2001. Plaintiffs seek imposition of the statutory $100 per day penalties against the NYS Fund administrator for failing to supply the requested materials within the thirty day time limits.

The court has considered the relevant factors, and concludes, despite plaintiffs' allegations, that there is no evidence of bad faith or intentional misconduct on the part of NYS Fund. To the contrary, on May 17, 1999, immediately after receipt of Plaintiff Butler's request for the plan document and reciprocal agreement, NYS Fund's Manager sent him copies of the NYS Fund's Plan and the 1964 National Reciprocal Agreement. (Menter Aff. Ex. 1 to Cross Motion ¶ 14). The NYS Fund Manager's cover letter explained that, at that time, the NYS Fund did not have a copy of the 1997 National Reciprocal Agreement in its possession, but advised Plaintiff Butler that pages 43 through 45 of the enclosed Plan Document contained the terms of the 1997 National Reciprocal Agreement. (Menter Aff. Ex. 10 to Cross Motion). On

February 2, 2000, the NYS Fund's Executive Administrator, David Menter, responding to Plaintiff Butler's second request, sent him another copy of Article 12 of the NYS Fund's Plan Document and explained that the terms of the 1997 National Reciprocal Agreement where incorporated into Article 12. (Menter Aff. Ex.1 to Cross Motion ¶ 23; and letter at Ex. 18).

On or about June 28, 2000, Plaintiff Butler made another request for all of the documents he was entitled to obtain under ERISA 29 U.S.C. § 104(b). On July 10, 2000, the NYS Fund's Executive Director sent him copies of all documents the NYS Fund had in its possession. (Menter Aff. Ex. 1 to Cross Motion ¶ 24). On March 5, 2001, Plaintiff Butler again requested a copy of the 1997 National Reciprocal Agreement. The NYS Fund only had an unsigned copy of this agreement at that time, but on March 22, 2001, the NYS Fund's Executive Administrator sent Plaintiff Butler the NYS Fund's only copy of the 1997 Reciprocal Agreement.

It appears that the NYS Fund made a good faith effort to respond to Plaintiff Butler's numerous requests for documents in a timely manner, supplied him with copies of all the requested documents it had available at those times. Additionally, the NYS Fund's actions, here, did not cause a prejudicial injury to plaintiffs by compelling them in initiate this lawsuit. Under the facts of this case, plaintiffs would have had to bring suit for their pension payment adjustments whether or not the requested documents had been provided, because the parties disagree on the interpretation of those documents. Under the circumstances, any

award to Plaintiffs "where the absence of either bad faith or prejudice is palpable, would be an unjustifiable windfall." Grohowski v. U.E. Systems, Inc., 917 F. Supp. 261, 262 (S.D.N.Y. 1986) Therefore, NYS Fund's cross motion for summary judgment is granted on this EISA claim, and Plaintiff's motion for summary judgment on this claim is denied.

Accordingly, the decisions of the NYS Fund's Board of Trustees affirming the calculations of Plaintiffs' partial pension are AFFIRMED; the NYS Fund's cross motion for summary judgment is GRANTED with respect to all claims; Plaintiffs' motion for summary judgment is DENIED; the complaint is DISMISSED in its entirety, and the NYS Fund's motion to strike Plaintiffs' demand for a jury trial is DENIED as moot.

IT IS SO ORDERED
Dated: February 15, 2005
Syracuse, New York

/s/ *Howard G. Munson*